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In the Supreme Court of the United States

OCTOBER TERM, 1997

SAIPAN HOTEL CORPORATION
DBA HAFADAI BEACH HOTEL,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

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QUESTIONS PRESENTED

Petitioner operates a luxury hotel and restaurants in the Commonwealth of the Northern Mariana Islands (CNMI). Petitioner employs "resident" and "nonresident" workers, as defined by CNMI law. The questions presented are:

1. Whether the National Labor Relations Board reasonably concluded that it has statutory jurisdiction over petitioner's nonresident workers pursuant to Section 2(3) of the National Labor Relations Act.

2. Whether the Board acted within its remedial authority in ordering petitioner to reinstate with backpay 21 nonresident workers, against whom petitioner was found to have discriminated because of their protected union activity, in violation of Section 8(a)(3) and (1) of the Act.

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OPINIONS BELOW

The opinion of the court of appeals in No. 96-70076 (Pet. App. 1-14) is reported at 114 F.3d 994. The opinion of the court of appeals in No. 96-70403 (Pet. App. 15-20) is unpublished, but the judgment is noted at 116 F.3d 485 (Table). The decisions and orders of the National Labor Relations Board (App., *infra*, 1a-10a; Pet. App. 58-83) are reported at 320 N.L.R.B. 192 and 321 N.L.R.B. 116. The decision of the Board in the representation proceeding (Pet. App. 89-147) is not reported.

JURISDICTION

The judgments of the court of appeals were entered on June 12, 1997. Petitions for rehearing were denied on July 28, 1997. Pet. App. 148-151. The petition for a writ of certiorari was filed on October 27, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 152(3), provides, in pertinent part, that "[t]he term 'employee' shall include any employee." Section 7 of the Act, 29 U.S.C. 157, provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

Section 502(a)(2) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant) provides: "The following laws of the United States * * * will apply to the Northern Mariana Islands[:] * * * those laws * * * which are applicable to Guam and which are of general application to the several States as they are applicable to the several States." 48 U.S.C. 1801 note. Section 503(a) of the Covenant provides: "The following laws of the United States * * * will not apply to the Northern Mariana Islands[:] * * * the immigration and naturalization laws of the United States." *Ibid.* It is settled law, as petitioner concedes, that the NLRA

applies to the Northern Mariana Islands. See Pet. App. 6, 97; *Micronesian Telecommunications Corp.* v. *NLRB*, 820 F.2d 1097, 1100-1101 (9th Cir. 1987).

2. Petitioner operates a luxury hotel and restaurants in Garapan, on the island of Saipan, Commonwealth of the Northern Mariana Islands (CNMI). Pet. App. 89-90 n.1, 94. In November 1994, the Commonwealth Labor Federation (Union) filed a representation petition with the National Labor Relations Board (NLRB or Board) requesting that the Board conduct an election to determine whether the Union should be certified as the collective bargaining representative for a bargaining unit consisting of all petitioner's eligible employees. *Id.* at 26, 90-91 & n.2.[1] At the time that the Union filed its representation petition, petitioner employed 47 "resident" and 94 "nonresident" workers. *Id.* at 94.

The terms "resident" and "nonresident" derive from a CNMI statute known as the Nonresident Workers Act (NWA), 3 N. Mar. I. Code §§ 4411 *et seq.*, an immigration law regulating nonresident workers in the CNMI. Pet. App. 95-96, 104. "Resident" workers include United States citizens and the indigenous population of the CNMI. *Id.* at 6, 96, 174. "Nonresident" workers include nonimmigrant, alien contract workers. *Id.* at 6, 173. Under the NWA, "resident" workers shall "be given preference in employment" in the Commonwealth, and "nonresident" workers "shall be employed only as necessary to supplement the available labor force." *Id.* at 105; see also *id.* at 171, 175. The NWA seeks to ensure

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[1] In January 1995, the petition was amended to include Local 5, Hotel Employees and Restaurant Employees, AFL-CIO, as joint petitioner.

that "any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers." *Id.* at 105, 171. The NWA establishes a procedure through which an employer is required to obtain approval from the CNMI government before hiring a nonresident worker. *Id.* at 107-115.[2]

The NWA provides that employment of nonresident workers "should be temporary and generally limited to the duration of the specific job or employment for which the alien was recruited." Pet. App. 105, 171. However, the NWA places no limit on the length of time that a nonresident worker may remain in the CNMI, provided he or she is employed pursuant to its requirements. *Id.* at 114. In fact, due to "the obvious lack of sufficient numbers of residents to occupy available positions in Saipan," most of petitioner's nonresident workers have been employed by petitioner for two to six years, and some have been employed by petitioner for ten years. *Id.* at 94-95, 133

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[2] Under the NWA, an employer wishing to hire a nonresident worker must first notify CNMI's Chief of Labor (Labor) about the job vacancy. If Labor is unable to refer a resident worker for the job, the employer must advertise the position. Pet. App. 107-108. If Labor finds that no resident worker is available to fill the vacancy, the employer may submit an application to employ a nonresident worker with Labor. *Id.* at 108. Once the employer's application is approved, it must submit the nonresident worker's employment contract to Labor for approval. *Id.* at 110. Approval of nonresident workers' employment contracts by Labor is routine and ministerial in nature. *Id.* at 132. Once the employment contract is approved, Labor issues a "Nonresident Worker Certificate," which is effective for one year. *Id.* at 113. Annual renewal of the certification, however, is routine and generally granted. *Id.* at 133. See generally *id.* at 178-199.

n.54. All of petitioner's nonresident workers are lawfully authorized, pursuant to the NWA, to work in the CNMI. *Id.* at 20.

In response to the Union's representation petition, petitioner conceded before the Board that its resident workers fall within the Board's statutory jurisdiction because they are "employees" within the meaning of Section 2(3) of the Act. Pet. App. 97, 116. However, petitioner contended that application of the Act to its nonresident workers would conflict with "the legislative control the CNMI exercises over the nonresident workers through the [NWA]" (*id.* at 97) and interfere with CNMI's "sovereignty over immigration" (*id.* at 117).

3. a. On March 23, 1995, the Board's Regional Director (RD) issued a decision rejecting petitioner's contentions and ruling that the Board has statutory jurisdiction over petitioner's nonresident workers. Pet. App. 115-120. The RD observed that "Congress clearly expressed its affirmative intention of applying the [NLRA] to the Northern Mariana Islands." *Id.* at 116 (quoting *Micronesian Telecommunications Corp.*, 273 N.L.R.B. 354, 356 (1984), subsequent order, 279 N.L.R.B. 1114 (1986), enforced, 820 F.2d 1097 (9th Cir. 1987)). The RD concluded that "there is no conflict between the Act and CNMI's immigration law as codified in the [NWA]," and that, accordingly, "application of the Act to the nonresident workers will not interfere with the CNMI's 'sovereignty over immigration.'" *Id.* at 117.

In reaching that conclusion, the RD explained that, in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), this Court "clearly established * * * that alien workers, including undocumented, illegal alien workers, employed in the United States are entitled to the Act's

protections" because those workers, regardless of their immigration status, are "employees" within the meaning of Section 2(3) of the Act. Pet. App. 118. The RD noted in particular the following passage from this Court's decision "because it is also applicable to the instant case" (*ibid.*):

> [A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.

Id. at 118-119 (quoting *Sure-Tan*, 467 U.S. at 892) (footnote and citation omitted).

Although petitioner's nonresident workers are not illegal aliens but rather lawfully reside and work in the CNMI, the RD found that there was "no reason not to apply the holding and the reasoning in *Sure Tan* to the nonresident workers." Pet. App. 119. The RD noted that "the purpose and policy of the NWA [are] that residents be given preference in employment and that 'any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers.'" *Ibid.* The RD explained that "providing the nonresident workers with the same rights as the

resident workers to participate in union activities * * * assures that there will not be created a 'subclass of workers without a comparable stake in the collective goals' of the resident co-workers, thereby protecting the terms and conditions of employment of the resident workers." *Id.* at 120 (quoting *Sure-Tan*, 467 U.S. at 892).

The RD also observed that, in *Sure-Tan*, the Court determined that "enforcement of the Act with respect to undocumented alien employees is compatible with" the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a primary purpose of which is to "preserve jobs for American workers" and to admit immigrant aliens to work in the United States "only if they 'will not adversely affect the wages and working conditions of the workers in the United States similarly employed.'" Pet. App. 119 (quoting 8 U.S.C. 1182(a)(14) (1988)). The RD explained that "application of the [NLRA] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment," and, "[i]f an employer realizes that there will be no advantage under the Act in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened." *Ibid.* For similar reasons, the RD concluded, application of the Act to nonresident workers in the CNMI would likewise promote the NWA's "purpose and policy" to grant employment preference to CNMI residents and to assure that employment of nonresidents will not impair the wages and working conditions of resident workers. *Ibid.* The RD also noted that CNMI has enacted legislation "protecting the rights of employees to bargain

collectively regarding their wages," and that that legislation "covers all employees, and does not exclude nonresident workers." *Id.* at 120.

Having concluded that petitioner's nonresident workers fall within the Board's statutory jurisdiction, the RD further found that, because the nonresident and resident workers share a "community of interest" with respect to their terms and conditions of employment, a unit consisting of both groups of employees is appropriate for the purposes of collective bargaining. Pet. App. 143-145. Accordingly, the RD directed that an election be conducted in that unit. *Id.* at 145-146.

b. On April 28, 1995, the Board denied petitioner's request for review of the RD's decision. Pet. App. 88.[3] On July 14, 1995, the Board conducted an election among petitioner's resident and nonresident employees. The Union won the election and was certified as the employees' bargaining representative. App., *infra*, 6a.

4. a. On August 8, 1995, the Board's General Counsel issued a complaint against petitioner, alleging (among other things) that petitioner had failed to renew the employment contracts of 20 nonresident employees and had refused to rehire nonresident employee Vincente Perez, in retaliation for their support of the Union, in violation of Section 8(a)(3)

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[3] Notwithstanding the RD's decision and the Board's denial of petitioner's request for review of that decision, petitioner filed an action in federal district court, seeking to enjoin the Board from asserting its jurisdiction over petitioner's nonresident employees. The court denied petitioner's request for injunctive relief and dismissed the suit. See *Saipan Hotel Corp.* v. *NLRB*, No. 95-0012, 1995 WL 583631 (D.N. Mar. I. June 9, 1995), reprinted at Pet. App. 23-33.

and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). Pet. App. 58, 67-68.[4] On September 29, 1995, the Board's General Counsel issued a second complaint against petitioner, alleging that it had refused to bargain with the Union and had refused to provide the Union with relevant requested information, in violation of Section 8(a)(5) and (1) of the Act. App., *infra*, 1a. Petitioner defended against the complaints on the ground that the Board lacked jurisdiction over its nonresident employees. Pet. App. 17, 59-60; App., *infra*, 2a.

b. On December 19, 1995, the Board issued a decision finding that petitioner had unlawfully refused to bargain with the Union and to provide it with relevant requested information, as alleged in the September 1995 complaint. App., *infra*, 1a-10a (*Saipan Hotel I*). The Board ordered petitioner to bargain with the Union and to provide it the requested information. *Id.* at 7a-9a. On May 1, 1996, acting on a stipulated record (see Pet. App. 16-17, 84-87), the Board issued a decision finding that petitioner had unlawfully discriminated against nonresident employees as alleged in the August 1995 complaint. *Id.* at 58-83 (*Saipan Hotel II*). The Board ordered petitioner (among other things) to reinstate with backpay Perez and the other 20 employees, "if necessary applying to the CNMI's Department of Labor and Immigration for entry permits and work authorization for these employees,

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[4] The RD also sought and was granted interim injunctive relief against petitioner in federal district court pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j), in connection with the violations alleged in the August complaint and pending the Board's adjudication of that complaint. See *Miller* v. *Saipan Hotel Corp.*, No. 95-0013, 1995 WL 583499 (D.N. Mar. I. June 9, 1995), reprinted at Pet. App. 34-55.

in accordance with the relevant provisions of the [NWA] and its implementing regulations." *Id.* at 77.

5. a. The court of appeals enforced the Board's order in *Saipan Hotel I*. Pet. App. 1-14. The court concluded that "[t]here is no defensible construction of 'employee' other than that the term applies to both categories of workers at issue here," *i.e.*, to petitioner's resident and nonresident workers alike. *Id.* at 9. The court explained that, "[g]iven that the NLRA applies to the CNMI, and the NLRA does not except nonresident (or alien) employees from its reach, the NLRB necessarily possesses jurisdiction over both resident and nonresident workers." *Ibid.* (citations omitted).

The court of appeals found that reading of the NLRA consistent with the language and intent of the Covenant. The court explained that, under Section 502(a)(2) of the Covenant, "federal statutes apply to the CNMI 'as they are applicable to the several states.'" Pet. App. 9. "Because the NLRA, as it is applied in the United States, does not distinguish between citizen and alien employees," the court concluded, "neither can the NLRA be applied in the CNMI to distinguish between resident and nonresident workers." *Ibid.*

The court of appeals also concluded that "application of the NLRA to the CNMI's nonresident workers does not contravene the statutory preference for resident workers expressed in the NWA because there is no necessary conflict between the NWA and the NLRA." Pet. App. 9. The court explained that "[t]he NWA's twin purposes—to protect residents' job security by giving them preferences in employment and to ensure that nonresidents' employment will not disadvantage residents' wages and working conditions

—are essentially the same as the purposes of the United States' immigration laws"; and, "as the Court recognized in *Sure-Tan*, bringing alien workers within the ambit of the NLRA ensures that citizen workers' economic interests will be better protected." *Id.* at 9-10 (citation omitted). Finally, the court of appeals held that "the shared common interests of the nonresident and resident workers fully justify the NLRB's determination that they should constitute a single bargaining unit." *Id.* at 13.

b. The court of appeals also enforced the Board's order in *Saipan Hotel II* in a separate, unpublished memorandum opinion. Pet. App. 15-20. The court rejected the contention that the Board's remedial order with respect to the 21 employees against whom petitioner had discriminated in that case "forced [petitioner] into a Hobson's Choice between violating the terms of the NLRB's order or violating the CNMI's laws." *Id.* at 17. To the contrary, the court of appeals held that the Board's order "did not in any way require [petitioner] to violate CNMI law, as codified in the NWA." *Id.* at 19. The court explained that the Board's reinstatement order "require[s] that [petitioner] obtain for the nonresident workers work authorizations and reentry permits in accordance with the NWA." *Ibid.* Moreover, the court of appeals noted, the CNMI government conceded before the court that petitioner "was able to reinstate 20 of the 21 * * * workers without violating the NWA." *Ibid.* The court further found that "the NLRB offers a workable solution for the 21st worker," Vincente Perez. *Ibid.*[5]

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[5] Regarding Perez, in the court of appeals, Board counsel suggested that, "in the single instance in which [petitioner] was

The court of appeals also rejected the contention that "the NLRB's requirement that [petitioner] give the nonresident discriminatees backpay violates *Sure-Tan*." Pet. App. 19. The court of appeals explained that, "[i]n *Sure-Tan*, the Court held that employees could only receive backpay for periods during which they were 'lawfully entitled to be present and employed in the United States.'" *Ibid.* (quoting *Sure-Tan*, 467 U.S. at 903). The court of appeals found that, unlike the workers in *Sure-Tan*, the employees here were legally present and "lawfully entitled to work in the CNMI." *Id.* at 20. Because "*Sure-Tan* did not preclude legal aliens in the United States from receiving backpay or reinstatement," the court concluded that "the nonresident workers here were entitled to the full benefit of any remedies the NLRB was authorized to order." *Ibid.*

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or the decision of any other court of appeals. Review by this Court is therefore not warranted.

1. In *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), this Court held that undocumented aliens are "employees" within the meaning of that term in the NLRA. The Court reasoned that its decision was

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faced with an apparent conflict between a replacement resident and a nonresident discriminatee who vied for the only position within a job category, [petitioner] could have created a second, substantially similar position for the nonresident worker, and maintained the replacement resident worker on its payrolls as well." Pet. App. 18; see NLRB C.A. Br. at 42, *Saipan Hotel II* (Nos. 96-70403, 96-70483).

consistent with the then-current INA, because the INA did not make it unlawful for an employer to hire an undocumented alien. *Id.* at 892-893. Petitioner errs in contending (Pet. 11-14) that the court of appeals' holding in *Saipan Hotel I* that petitioner's nonresident workers are likewise "employees" under the NLRA is inconsistent with *Sure-Tan*. As the court of appeals found, petitioner's nonresident employees are "lawfully entitled to work in the CNMI." Pet. App. 20. Thus, the holding of the court of appeals is fully consistent with this Court's reasoning in *Sure-Tan*.

Petitioner nonetheless contends (Pet. 11) that, "unlike the [INA at the time of] *Sure-Tan*, the [NWA] is irreconcilable with the [NLRA]" for several reasons. First, petitioner argues (Pet. 14) that the Board's determination that petitioner's resident and nonresident employees share a "community of interest" that makes them an appropriate unit for collective bargaining (Pet. App. 143-145) conflicts with the NWA's preference for resident employees. The NWA does not provide, however, that nonresident workers who have been authorized to work in the CNMI cannot be included in bargaining units along with their resident co-workers.

In this case, the Board applied well-settled criteria to the specific working conditions of petitioner's resident and nonresident employees and reasonably found that one bargaining unit is appropriate. The Board expressly acknowledged that the resident and nonresident workers' employment conditions differ in a few respects due to "the requirements contained in the NWA." Pet. App. 144-145. The Board concluded, however, that those differences are not "sufficient to outweigh the overwhelming evidence * * * which

demonstrates the community of interest existing between the resident and nonresident employees." *Id.* at 145.[6] The Board's fact-bound determination, which was upheld by the court of appeals (*id.* at 13), raises no issue warranting this Court's attention. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947) ("The issue as to what unit is appropriate for bargaining * * * involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed.").

Second, petitioner contends (Pet. 14) that "application of the NLRA to nonresidents would enable nonresident workers to bargain for permanent employment," which "would clash directly with the NWA requirements that nonresident employment contracts be limited to one year." The hypothetical scenario posited by petitioner is not presented by this case, however. The Union has not negotiated contract

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[6] Thus, the Board found that, although petitioner "maintains different health insurance policies, and provides certain additional benefits for the nonresident employees as compared to its resident employees," nonetheless, both groups of employees "work side by side in the same geographical work locations, share common supervision, similar hours of work and shifts," "are hired, trained and supervised by the same department heads," "work in the same job classifications, with essentially the same or similar job duties and assignments," "receive the same or similar wage rates, including bonuses, annual pay increases and overtime," and are subject to the "same factors" in regard to discharge. Pet. App. 144. See also *Dredge Operators, Inc.*, 309 N.L.R.B. 984, 984-985 & n.2 (1992) (unit consisting of all seamen employed aboard a U.S. flag vessel was appropriate for bargaining, notwithstanding that, subsequent to the union's certification, the government of Hong Kong required the employer to hire Hong Kong citizens, in addition to its American workers), enforced, 19 F.3d 206 (5th Cir. 1994).

terms granting petitioner's nonresident workers "permanent employment." Rather, petitioner, in violation of the Act, has refused to bargain with the Union about employment terms altogether. See App., *infra*, 6a-7a. In any event, petitioner's hypothetical case is based on the incorrect factual premise that a nonresident worker cannot lawfully work in the CNMI for more than one year. The length of tenure of petitioner's own nonresident workers, most of whom have worked for petitioner two to six years (Pet. App. 133 n.54), refutes that premise. The NWA places no limit on the length of time that a nonresident worker may remain in the CNMI provided his or her employment contract has been approved by the CNMI government, which "routine[ly] and generally" grants applications for annual renewal of those contracts. *Id.* at 114, 133.

Third, petitioner argues (Pet. 15) that "the NLRB reinstatement order in [*Saipan Hotel II*] is irreconcilable with the resident preference under the NWA." The Board's order, however, is wholly consistent with the NWA. The Board required that petitioner offer the employees against whom it discriminated "reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions * * * if necessary applying to the CNMI's Department of Labor and Immigration for entry permits and work authorizations for these employees, *in accordance with the relevant provisions of the [NWA].*" Pet. App. 77 (emphasis added).

Petitioner complains (Pet. 15 & n.8), however, that the Board's order inappropriately requires petitioner to maintain a "'double-hire' situation," *i.e.*, to "(a) offer a substantially similar position or create a new position for each nonresident; *and*, (b) at the same

time, offer that position to each and every qualified resident applicant until the entire resident pool was exhausted." That complaint is not supported by the record. The CNMI government conceded in the court of appeals that petitioner "was able to reinstate 20 of the 21 * * * workers without violating the NWA." Pet. App. 19. There is no indication in the record, nor does petitioner allege before this Court, that, in order to reinstate those 20 workers consistently with the NWA, petitioner was required to create a second set of 20 similar jobs and fill them with resident workers. Rather, as the court of appeals noted, a "double hire" situation might be presented only in the case of "the 21st worker," Perez, and then only if his former position were presently occupied by a resident worker and no vacancies in his job category existed. *Id.* at 18-19.

Even as to Perez, however, the Board's order does not necessarily require petitioner to "double hire." Rather, the Board suggested, in its brief in the court of appeals, that one way (among others) that petitioner could satisfy its remedial obligation in the event that resident workers currently held all the available positions within Perez's former job category would be to create an additional position and offer that position to Perez if no qualified resident worker applied for it. See NLRB C.A. Br. at 42, *Saipan Hotel II* (Nos. 96-70403, 96-70483); Pet. App. 18. Although the court of appeals found that proposal to be a "workable solution" (Pet. App. 19), the Board's order does not *compel* petitioner to adopt the proposal. It requires only that petitioner reinstate Perez to his former or a substantially equivalent position "in accordance with the relevant provisions of the [NWA]." See *id.* at 77. The precise manner in which

petitioner satisfies its remedial obligation is a matter to be determined in compliance proceedings, where the Board "tailor[s] the remedy to suit the individual circumstances of each discriminatory [action]." *Sure-Tan*, 467 U.S. at 902.[7]

2. Nor is there merit in petitioner's contention (Pet. 16-19) that the court of appeals' decision in *Saipan Hotel II*, upholding the reinstatement and backpay remedy fashioned by the Board for the 21 employees against whom petitioner discriminated, is inconsistent with the remedial holding of *Sure-Tan*. In *Sure-Tan*, this Court held that reinstatement of illegal alien employees who were no longer present in the United States must be "condition[ed] * * * on the employees' legal reentry," and, further, that, "in computing backpay, the employees must be deemed 'unavailable' for work * * * when they were not lawfully entitled to be present and employed in

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[7] Petitioner mischaracterizes the district court's decision in the Section 10(j) proceeding in suggesting (Pet. 15 n.7) that "[t]he NLRB 'reinstatement' demand for Vincente Perez so fundamentally violates the CNMI's plenary authority over immigration" that the court "chose instead to place Perez on a preferential list from which he would be hired only if no qualified resident worker applied for the position." The district court did not rule that the "double hire" proposal, described in the text above, would violate CNMI law. See Pet. App. 34-55. The district court did not pass on that proposal, because the Board's Regional Director did not request that remedy at the interim injunction stage. See *id.* at 49-50 & n.4. Moreover, the relief ordered by the district court on behalf of Perez is consistent with the "double hire" proposal. Each conditions Perez's reinstatement to a storekeeper position on the unavailability of a qualified resident worker to fill the vacancy. Compare NLRB C.A. Br. at 42, *Saipan Hotel II* (Nos. 96-70403, 96-70483), with Pet. App. 54.

the United States." 467 U.S. at 903. That holding, however, has no bearing on this case, because the 21 nonresident employees granted relief by the Board's order are not illegal aliens in the CNMI. Rather, as the court of appeals observed, those workers are legally present and "lawfully entitled to work in the CNMI." Pet. App. 20. They are thus "entitled to the full benefit of any remedies the NLRB was authorized to order." *Ibid.*

Petitioner errs in suggesting (Pet. 16) that the nonresident workers should nonetheless be treated as if they were illegal aliens because their "temporary employment contracts had expired and [they] consequently had no authorization to be present or employed in the CNMI." That suggestion conflicts with the express holding of the court of appeals that the workers are entitled to be present and to work in the CNMI. See Pet. App. 20. It conflicts with the fact that petitioner has already reinstated all but one of the employees consistent with the NWA. *Id.* at 19. And it also ignores the Board's finding that the reason the workers' contracts expired in the first place was that petitioner unlawfully refused to renew the contracts with the CNMI authorities. *Id.* at 67.[8]

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[8] Petitioner incorrectly contends (Pet. 15 n.8) that, "pursuant to stipulation, unfair labor practices were never established nor litigated on the merits" in *Saipan Hotel II*. The court of appeals properly rejected that contention, ruling instead that the stipulation in that case "plainly provides that the parties submitted the case, in its entirety, for decision by the NLRB," that "the complaint, which was incorporated into the stipulation * * *, alleged that [petitioner] had committed acts that violated the NLRA," and that "[petitioner] merely 'denie[d] the commission of any unfair labor practices'—and withdrew its answer explaining that position," preserving only "its

Petitioner also errs in asserting (Pet. 17-19) that the court of appeals' decision upholding the Board's remedial award conflicts with the decisions of other circuits. Unlike the present case, the cases on which petitioner relies involve application of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, which amended the INA to make it unlawful to hire undocumented aliens, see 8 U.S.C. 1324a(a). At issue in those cases is whether that change in the INA alters the import of this Court's holding in *Sure-Tan* for aliens who are illegally present and unauthorized to work in the United States. As explained above, the decision of the court of appeals in this case was based on an express finding that petitioner's workers are both lawfully present and entitled to work in the CNMI.

3. Finally, petitioner contends (Pet. 19-28) that the court of appeals in *Saipan Hotel I* improperly deferred to the Board's interpretation of the NWA and ignored the provisions of the Covenant in concluding that the Board possessed statutory jurisdiction over its nonresident workers. Petitioner's contentions, however, are based on a mischaracterization of the decision of the court of appeals. That court did not "defer" to the Board's interpretation of the NWA. Rather, reviewing the NWA *de novo*, the court correctly concluded, as had the Board, that "application of the NLRA to the CNMI's nonresident workers does not contravene the statutory preference for resident workers expressed in the NWA because there is no necessary conflict between the NWA and

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defenses relating to the NLRB's assertion of jurisdiction." Pet. App. 17; see also *id.* at 84-87.

the NLRA." Pet. App. 9.[9] Nor did the court of appeals ignore the provisions of the Covenant. Rather, the court properly concluded that the Covenant supported the Board's assertion of jurisdiction, because Section 502(a)(2) of the Covenant makes "federal statutes apply to the CNMI 'as they are applicable to the several states,'" and "the NLRA, as it is applied in the United States, does not distinguish between citizen and alien employees." *Ibid.*

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[9] Because the court of appeals did not defer to the Board's interpretation of the NWA, there is also no merit to petitioner's claim (Pet. 21-22) that the court's decision conflicts with the holdings of other courts of appeals declining to defer to an agency's interpretation of a statute that it has not been charged to administer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

DECEMBER 1997

APPENDIX A

NATIONAL LABOR RELATIONS BOARD

Case 37-CA-4202

SAIPAN HOTEL CORPORATION,
D/B/A HAFADAI BEACH HOTEL AND HOTEL EMPLOYEES
& RESTAURANT EMPLOYEES,
LOCAL 5, AFL-CIO AND COMMONWEALTH LABOR
FEDERATION

December 19, 1995

DECISION AND ORDER

By Members BROWNING, COHEN, and TRUESDALE

Pursuant to a charge filed by Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and Commonwealth Labor Federation, the Union, on August 29, 1995, the General Counsel of the National Labor Relations Board issued a complaint on September 29, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to furnish necessary and relevant information following the Union's certification in Case 37-RC-3687. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an

answer admitting in part and denying in part the allegations in the complaint.

On October 30, 1995, the General Counsel filed a Motion for Summary Judgment and memorandum in support. On November 1, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 4, 1995, the General Counsel filed a further brief in support of the motion for summary judgment, and on December 6, 1995, the Respondent filed a brief in opposition to the motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain and to furnish information, but attacks the validity of the Union's certification on the basis of its arguments in the representation proceeding that the Board lacks jurisdiction over this matter and that the unit is inappropriate because it includes both nonresidents and residents.[1]

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[1] The Respondent has not specifically asserted as a defense in the instant proceeding certain additional objections it filed to conduct allegedly affecting the results of the election in the representation proceeding. In any event, we find that the Respondent is barred from doing so inasmuch as it failed to file a request for Board review of the Regional Director's supplemental decision overruling the additional objections. See *A. Bonfatti & Co.*, 316 NLRB 623 fn. 1 (1995), and cases cited there.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[2] We therefore find that the Respondent

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[2] In his March 23, 1995 Decision and Direction of Election, which the Board effectively affirmed by order dated April 28, 1995, the Regional Director applied by analogy the principles and standards set forth in *Res Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986), and found that the Board had jurisdiction over the Respondent's nonresident workers under those principles and standards inasmuch as the Employer retained sufficient control over essential terms and conditions of employment of its nonresident workers to enable it to engage in meaningful bargaining. Although the Board, Member Cohen dissenting, subsequently overruled the *Res Care/Long Stretch* line of cases in its July 18, 1995 decision in *Management Training Corp.*, 317 NLRB 1355 (1995), the Board thereby effectively broadened rather than restricted its jurisdiction. Thus, *Management Training* holds that, in determining whether to assert jurisdiction, "the Board will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." 317 NLRB at 1358. Accordingly, we find that the Board's decision in *Management Training* provides no basis for reconsidering the Regional Director's jurisdictional findings. Further, "absent special circumstances, the Board has traditionally applied the pronouncement of a new rule of law to the case in which it arose and to all pending cases." *Hickman Harbor Service*, 266 NLRB 476, 477 (1983), enfd. in pertinent part 739 F.2d 214 (6th Cir.1984). We shall, therefore, apply the rule of law expressed in *Management Training* to the present case, and

has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no issues requiring a hearing with respect to the Union's request for information. The Union requested the following information from the Respondent:

1. Name, age, classification, wage rate, red-circle rate (if any), and seniority dates of each covered employee.

2. Weighted Average Wage Rate.

3. Total compensable hours per month for the past year.

4. Total cost, on a compensable hour basis, of use for each benefit (sick leave, vacation pay, holiday pay, funeral leave, overtime, etc.).

5. Cost per employee per month for the medical, dental, drug, and vision plans and any co-payment required of any employee.

6. Cost per employee per month for any retirement plans.

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we find that it provides an additional basis for asserting jurisdiction.

Member Cohen adheres to his dissenting position in *Management Training*. Further, he does not reach the retroactivity issue, and would assert jurisdiction on the basis cited by the Regional Director.

7. Cost per employee for any other benefits: e.g. housing, meals, etc.

Although the Respondent in its answer states that it is without knowledge or information sufficient to form a belief as to whether the foregoing information is necessary and relevant, it is well established that such employee, wage, and benefit information is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Tire America*, 315 NLRB 197 (1994); and *Holiday Inn Coliseum*, 303 NLRB 367 (1991).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation of the Commonwealth of the Northern Mariana Islands (CNMI), with an office and place of business located in Garapan, on the Island of Saipan, CNMI, has been engaged in the operation of a hotel and restaurants. During the calendar year ending December 31, 1994, the Respondent, in conducting its operations, derived gross revenues in excess of $500,000 and purchased and received at its Garapan, Saipan, CNMI facility, goods and materials valued in excess of $5000, which originated from points outside the CNMI.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held July 14, 1995, the Union was certified on August 25, 1995, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees of the Employer employed in the CNMI excluding all managers, professional and confidential employees, guards and supervisors as defined in the Act. The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About August 28, 1995, the Union requested the Respondent to bargain and to furnish relevant and necessary information, and, since about the same

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[3] Although the Respondent in its answer states that it is without knowledge or information sufficient to form a belief as to whether the Union is a 2(5) labor organization, the Respondent stipulated to the Union's 2(5) labor organization status in the underlying representation proceeding. Accordingly, we find that the Respondent is precluded from litigating the issue in this proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992), and cases cited there.

date, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after August 28, 1995, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested necessary and relevant information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir.1964), cert. denied 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir.1965).

ORDER

The National Labor Relations Board orders that the Respondent, Saipan Hotel Corporation, d/b/a Hafadai Beach Hotel, Saipan, Commonwealth of the Northern Mariana Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Hotel Employees & Restaurant Employees, Local 5, AFL-CIO, and Commonwealth Labor Federation, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All employees of the Employer employed in the CNMI excluding all managers, professional and

confidential employees, guards and supervisors as defined in the Act.

(b) Furnish the Union the information that it requested on August 28, 1995.

(c) Post at its facility in Saipan, Commonwealth of the Northern Mariana Islands, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and Commonwealth Labor Federation, as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All employees employed by us in the CNMI excluding all managers, professional and confidential employees, guards and supervisors as defined in the Act.

WE WILL furnish the Union the information that it requested on August 28, 1995.

SAIPAN HOTEL CORPORATION, d/b/a
HAFADAI BEACH HOTEL